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No. 875

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

JOHN B. DESROSIERS,

Petitioner,

vs.

FORD MOTOR COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FOREWORD

As merely a brief analysis of the "Questions Involved" and the "Reasons Relied on for Allowance of the Writ" as set forth in the petition filed herein is required to demonstrate their insufficiency to support the issuance of the writ, we shall confine the following discussion mainly to pointing out the respects in which they signally fail to set forth reasons of the character exampled in Rule 38, Par. 5(b) of this Court as justifying the exercise of this Court's discretion to issue the writ.

Although petitioner's "Summary and Short Statement" (Pet. p. 1 to 4) contains many inaccuracies and omissions, we refrain, for the sake of brevity, from commenting upon them or from burdening the Court with a substitute statement, but merely direct attention to the non-compliance with Supreme Court Rule 27, Par. 2(d), evidenced by the total absence of any reference to the record in petitioner's Statement to support any of its seemingly factual recitations.

ARGUMENT

PETITIONER'S POINT I.*

Question 1 (p. 5) clearly imports a negative answer by showing that petitioner misconceives the law in deeming the decision of the First Circuit Court of Appeals in the instant case "a departure from the accepted and usual course of judicial proceedings" (Sup. Ct. Rule 38, Par. 5(b)) because it *sustained the decision* of the District Court "on *grounds* entirely distinct from those relied on" by the District Court. That an appellate court may base its affirmance on entirely different grounds than those adopted by the lower court is established by a long line of decisions.

> *Dean v. Davis*, 212 F. 88, appeal granted 221 Fed. 1020, Certiorari denied 235 U. S. 702, and decree affirmed 242 U. S. 438;
> *Smart v. Wright*, 227 F. 84;

*For the sake of brevity we shall discuss each Question and Reason under the headings Point I, Point II, etc., with a few brief allusions to the Argument relating thereto under the respective correspondingly numbered Points as set forth in petitioner's supporting brief.

Lewis Hall Iron Works v. Blair, 23 F. 2d. 972, Certiorari denied 277 U. S. 592;

Abernathy v. State of Oklahoma, 31 F. 2d. 547, Certiorari denied 280 U. S. 599;

Park Lane Dresses v. Houghton & Dutton Co., 54 F. 2d. 33;

Mills Novelty Co. v. Monarch Tool & Mfg. Co., 49 F. 2d. 28; Certiorari denied 284 U. S. 662.

Petitioner's misconception of the law is on a par with his misconstruction of the decisions below. The appellate court did not base its holding of invalidity on grounds "entirely distinct from those relied on by the District Court," but both courts held the patent in suit invalid on identically the same grounds, viz, for lack of invention. (See District Court Finding of Fact 12, R. 17, and Conclusion of Law 1, R. 18, and the Court of Appeals decision R. 193). The assertions in the petition (p. 6) and supporting brief (p. 16, 17) that the Circuit Court of Appeals overruled the District Court are not only contradictory to petitioner's previous statements that it generally affirmed (p. 3) and sustained the District Court (p. 5) but are completely at variance with the Court of Appeals unequivocal holding that

> "*The judgment of the District Court is affirmed*" (R. 193).

Examination of the cases *Magnum Import Co. v. Coty* (262 U. S. 159), and *E. H. Ferree Co. v. United Shoe Machinery Co.* (290 U. S. 614 and 708), upon which petitioner mainly relies as justifying the writ, reveals that although certiorari was granted in the Ferree case (262 U. S. at p. 614), the writ was "dismissed per stipulation of counsel" (262 U. S. at p. 708); and, that the decision in the Magnum case instead of justifying the issuance of the writ here dictates its denial.

PETITIONER'S POINT II.

Petitioner bottoms his Point II on alleged errors "clearly apparent on the face of the opinion" of the Circuit Court of Appeals (Question 2, p. 5, Reason 2, p. 7 and Argument pp. 17-22). Although Question 2 alleges "*errors of law* clearly apparent on the face of the opinion," Reason 2 advanced in support thereof shows that petitioner has seized mainly upon the use of the word "says" in the penultimate line of the court's opinion (R. 193) as the error of law complained of. Question 2 also poses the query whether the Court will grant certiorari to correct "a clearly erroneous legal interpretation in the opinion of a skeletonized schematic sketch appearing in a publication." Or in other words, the reading of a drawing. What the drawing shows is a matter of fact and is not made any the less so by calling its reading by the Court below a "legal interpretation."

We know of no case in which this Court has granted certiorari to review such an obvious fact finding as the reading of a drawing in a reference publication. Surely this is not such a question of vital public importance as to warrant review of the matter by the Supreme Court of the United States. Petitioner advances no cogent reason in this respect for review in his Reason 2, but reveals in his argument his real motive for seeking certiorari to be because:

> "The explanation of the Appellate Court as to the construction and operation is diametrically opposed to that of the petitioner" (Br., p. 24).

Petitioner attempts to support his Point II by a six-page discussion (pp. 17-22) devoted not to what appears

"on the face of the opinion," nor even to what appears on the face of the reference publication,—Automotive Industries—but to two sets of doctored drawings, not introduced in evidence and for which there is neither record support nor justification. The length and nature of this argument (which like petitioner's statement of the case is barren of record references to support its seemingly factual statements) completely decries, if not belies the so-called "errors of law clearly apparent on the face of the opinion" or the so-called "clearly erroneous legal interpretation" of the drawing or sketch of the reference publication.

PETITIONER'S POINT III.

Reason 3 (pp. 8-9) states "the decision of the Circuit Court of Appeals involves a Federal question" but omits to state, nor is any assertion made, that it is a question of great, or far-reaching or any public importance.

It then proceeds, under subdivisions (a) to (e) inclusive, to set forth certain well-defined general principles of patent law and cites cases in support thereof which it says were "*ignored*" by the Circuit Court of Appeals. As the Court neither discussed any of these principles, nor cited, nor discussed, nor ruled *contra* the cases cited by petitioner, it is, to say the least, a violent assumption that the Court "ignored" them.

Question 4 (p. 6), which appears to be a mere appendage to question 3, seems to pose a surgical rather than a legal point and to enunciate petitioner's foreboding of the denial of his petition, coupled with a suggestion of all sufficient reasons for its denial.

PETITIONER'S POINT IV.

Under Question 5 (p. 6) and Reason 4 (p. 9) petitioner seeks to make it appear that the Court of Appeals decision in this case is in conflict with the Court of Customs and Patent Appeals decision in the case of *In re Dodge* (74 F. 2nd. 756), by claiming "there is a conflict between the *reasoning* in the decisions of the two courts." A truly novel grounds for certiorari!

There is no conflict of the type that justifies certiorari such as existed in *Sanitary Refrigerator Co. v. Winters* (280 U. S. 30) nor as contemplated by Supreme Court Rule 38, Par. 5(b) on which petitioner relies. *In re Dodge* did not pass on the validity of the DesRosiers patent in suit Re. 20086, for that decision was rendered January 28, 1935, prior to the issuance of said patent on September 1, 1936. Therefore the validity of this patent was not, and could not have been, before the Court of Customs and Patent Appeals in the *Dodge* case. Neither is there conflict even in the "reasoning" of the courts. In the *Dodge* case even though the Court of Customs and Patent Appeals recognized, as did the First Circuit Court of Appeals, the lack of a showing of a certain lost motion connection between the foot brake pedal and the controller shaft in the Automotive Industries publication, its reasoning and decision were in complete harmony, and not in conflict, with the reasoning and decision of the First Circuit Court of Appeals in the instant case. The former tribunal very definitely held that an attempted distinction over the reference, set forth in the claims it considered, and which were sought to be obtained in the Dodge application for patent, "would be obvious to one skilled in the

art to solve the problem in accordance with applicant's arrangement" and "immaterial from the standpoint of invention" (74 F. 2d. 758), while the latter held "* * * it would clearly be a simple routine matter not calling for the skill of an inventor to modify the Darracq (Automotive Industries) structure by adding any one of the old and well known one-way connections between the foot brake pedal and controller shaft if thought desirable" (R. 193).

PETITIONER'S POINT V.

Under Question 6 (p. 6) and Reason 5 (p. 10), petitioner urges "Certiorari should be granted, since further conflict of decisions is now impossible, the patent in suit having expired * * *" (p. 10). No pretense is made that any question of public interest is involved. The fact that the patent in suit has expired demonstrates there can be no question of, either great, or, any public interest.

The facts are that a simple private controversy, in no wise of any public interest, has been waged between the parties and petitioner was defeated. No unsettled question of law is involved. Both courts below agreed in holding invention was lacking,—a plain issue of fact, the appellate court, however, in affirming the lower court, giving an additional or cumulative reason for its affirmance.

The only opinions that are in conflict here are the opinion of petitioner's counsel and the concurring opinions of both courts below that the patent in suit was invalid as lacking invention. Obviously, petitioner falls in that class of which this Court, in *Magnum Import Co. v. Coty, supra*, upon which petitioner so heavily relies, stated:

> "Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ" (p. 163).

This Court's holding in the Magnum case:

> "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

dictates a denial of the petition here which has nothing to sanction it but that petitioner, the defeated party in the Court of Appeals, would like to be given another hearing.

CONCLUSION

We submit that the petition is wholly without merit and should be denied.

Respectfully submitted,

I. JOSEPH FARLEY,
Counsel for Respondent.